

86-989

No. 86-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his official capacity as
the Mayor of the City of New York, and the
NEW YORK CITY POLICE DEPARTMENT,
Petitioners,

-against-

MICHAEL J. OLIVIERI, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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December 12, 1986

4012

QUESTION PRESENTED

1. Where petitioner police department determined that the danger to public safety arising from competing requests by respondents, a group of gay Catholics, and counter-demonstrators, for use of the sidewalk in front of St. Patrick's Cathedral during a "Gay Pride March" down New York City's Fifth Avenue required that such groups demonstrate from separate areas near but off the Cathedral sidewalk, with respondents allowed to conduct a short service in front of the Cathedral, and where the Court of Appeals agreed that the presence of both groups on the Cathedral sidewalk posed a threat to public safety, may the Court of Appeals hold that the de minimus restriction on respondents' speech violated the respondents' first amendment rights and substitute its judgment for that of petitioner police department by ordering

that members of the competing groups be allowed to remain on the Cathedral sidewalk, in a barricaded area, for limited and different periods of time during the March?



LIST OF PARTIES

The parties in the proceeding below
were:

Plaintiffs (Respondents here)

MICHAEL J. OLIVIERI
J. MATTHEW FORMAN
MICHAEL DILLINGER
TOM KOHLER
RICHARD FERRARA
EDMUND W. TRUST
HUGH R. BRUCE
JOHN D. EDWARDS
JOSEPH BROWN
JULIUS J. SPOHN
BERNARD L. TANSEY
CLINT WINANT
DAVID LAWLOR
JIM CANNON
JAMES DOYLE
NED LYNAM
EDWARD BYRNE
MICHAEL CONLEY
EDWARD HARBUR
ROBERT J. BUEL
CHRISTOPHER WESOLOWSKI
GARY M. SPOKES
DIGNITY - NEW YORK

Defendants (Petitioners here)

BENJAMIN WARD
EDWARD KOCH
NEW YORK CITY
POLICE DEPARTMENT



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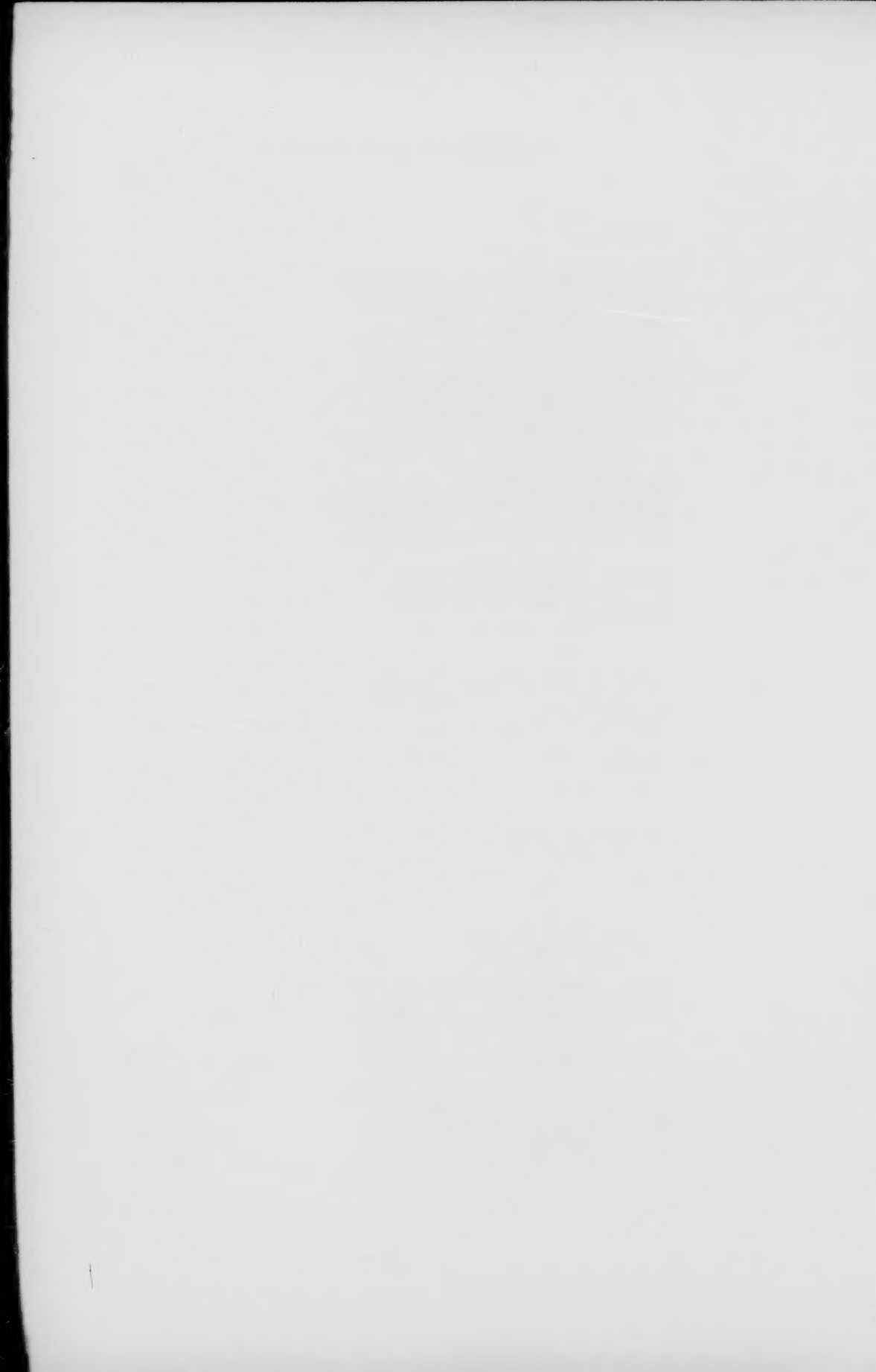


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BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his official capacity as
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Petitioners,

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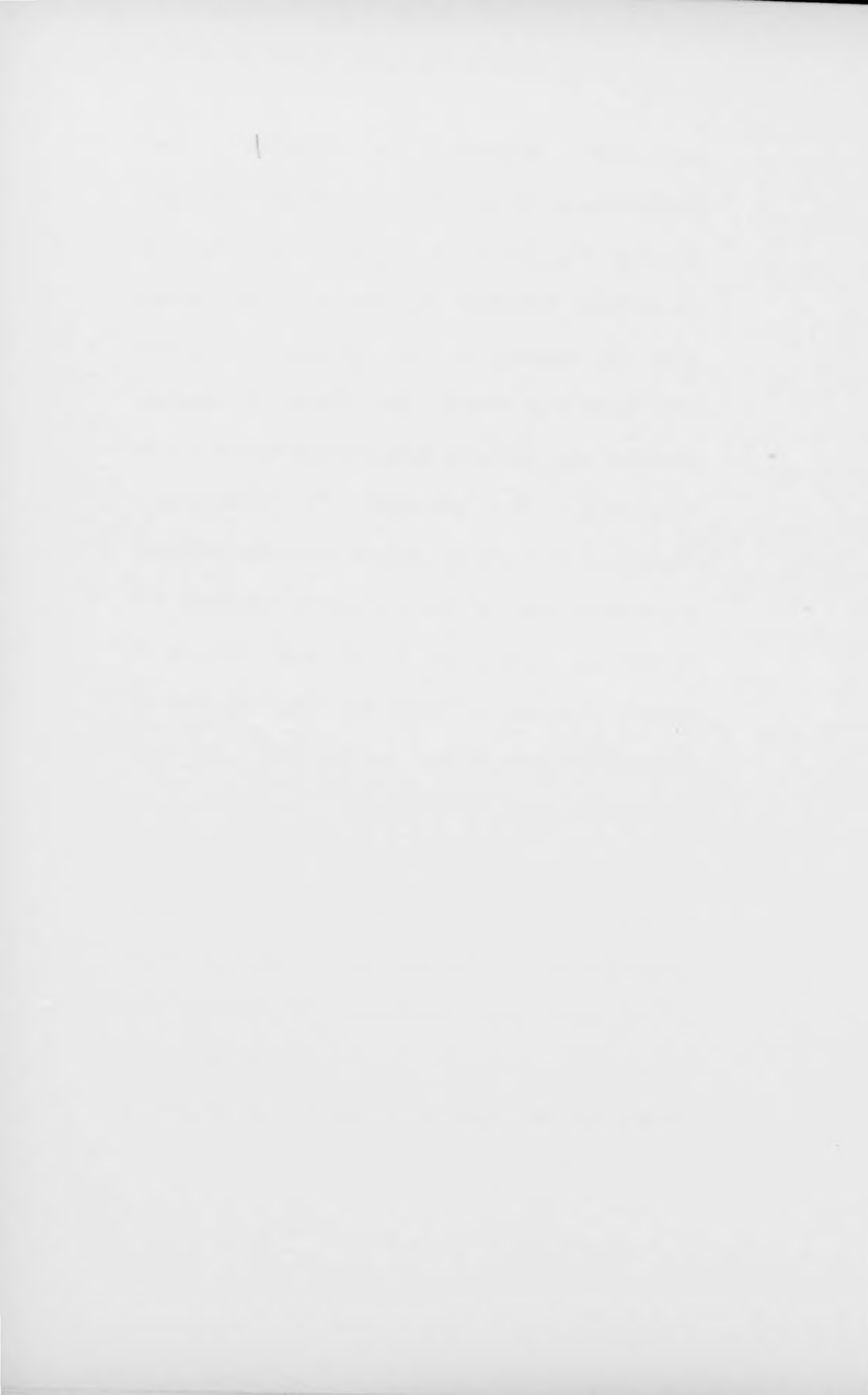
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioners, Benjamin Ward, Police
Commissioner of the City of New York,
Edward I. Koch, Mayor of the City of New
York, and the New York City Police
Department, respectfully pray that a Writ of
Certiorari issue to review the judgment of

the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on September 16, 1986. The United States District Court for the Southern District of New York (Motley, C.J.), by judgment entered June 13, 1986, declared that the petitioners' determination that respondents, a group of gay Catholics, may not demonstrate on the public sidewalk directly in front of St. Patrick's Cathedral during the annual "Gay Pride March" in New York City was not a reasonable time, place and manner regulation, and enjoined petitioners from preventing up to 100 members of respondent Dignity-New York from demonstrating on the Cathedral sidewalk during the 1986 and subsequent Gay Pride Parades. The Court of Appeals held that the District Court erred in failing to consider the constitutional rights of counter-demonstrators to be present on the

Cathedral sidewalk to express their opposition to respondents' message. In light of what the Court of Appeals described as an obvious potential for confrontation arising from the sharing of the sidewalk by groups with opposing views, the Court of Appeals modified the District Court's injunction so as to allow 25 members of respondent Dignity-New York to remain within a limited, barricaded area of the Cathedral sidewalk for 30 minutes during the Parade and, after a 30 minute interval, to allow the same number of counter-demonstrators to appear on the sidewalk under the same circumstances. Although the District Court's declaration of unconstitutionality was substantially grounded in its finding that petitioners' fear of violence was irrational, a concern the Court of Appeals itself considered in modifying the injunctive relief, the Court of



Appeals nevertheless affirmed the declaration of unconstitutionality.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the District Court's declaration that respondents' first amendment rights had been violated is reported at 801 F.2d 602 and is reprinted in the Appendix at page 1. The opinion of the United States District Court for the Southern District of New York is reported at 637 F. Supp. 851 and is reprinted in the Appendix at page 35.

The prior opinion of the Court of Appeals reversing the order of the District Court and denying respondents' application for a preliminary injunction is reported at 766 F.2d 690 and is reprinted in the Appendix at page 163. The prior opinion of the District Court granting respondents a preliminary injunction is reported at 613 F.



Supp. 616 and is reprinted in the Appendix at page 202.

JURISDICTION

The judgment of the Court of Appeals was dated and entered September 16, 1986. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C. §1254(1). The petition has been filed within the time allowed by law.

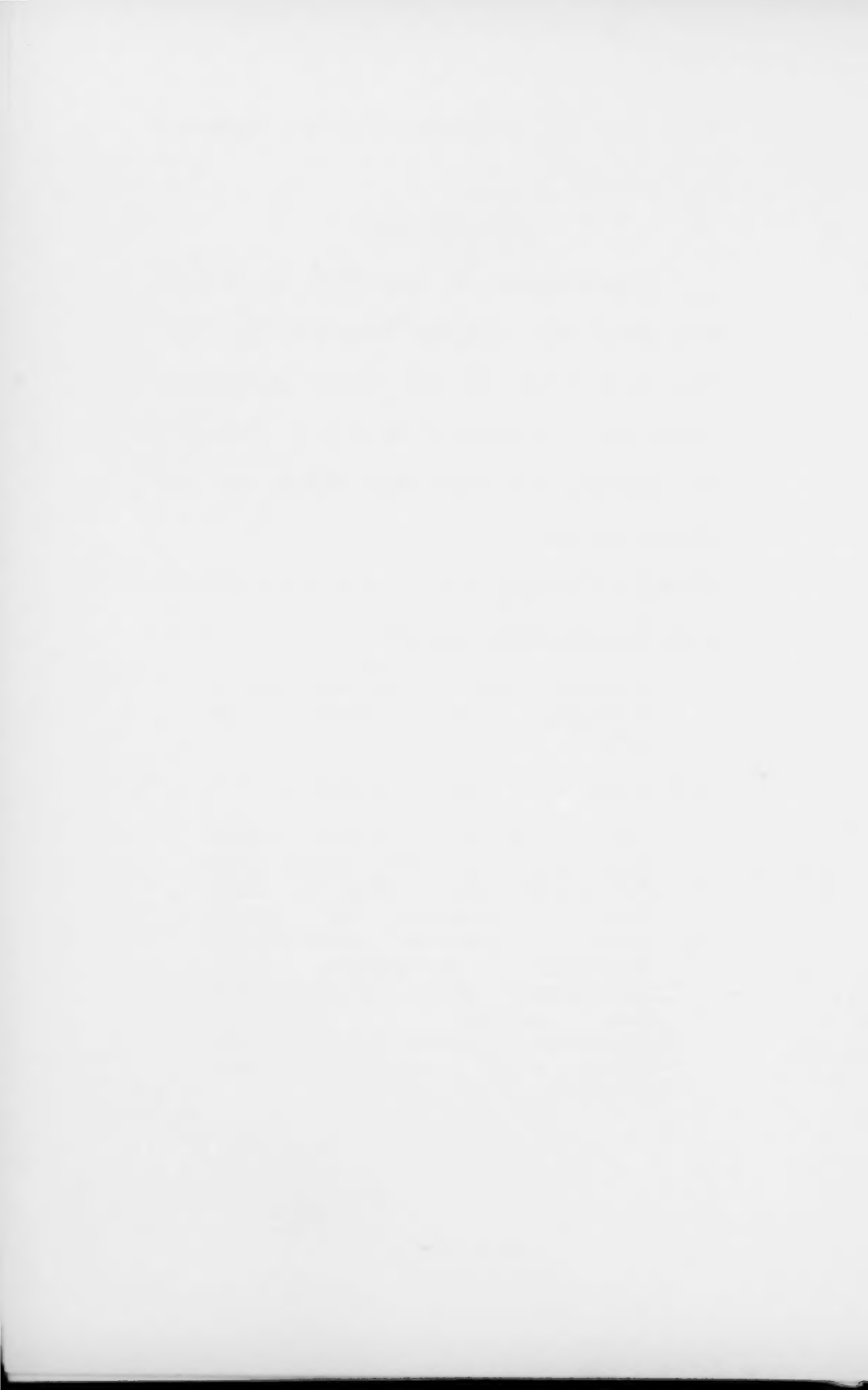
CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I:

Congress shall make no law...
abridging the freedom of
speech....

NEW YORK CITY CHARTER §435(a):

The [New York City] police department and force shall have the power and it shall be their duty to preserve the public peace,... disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public... sidewalks... [and]... protect the rights of persons and property... .



STATEMENT OF THE CASE

(1)

Respondent Dignity-New York ("Dignity") is the local chapter for New York City of an international organization of gay and lesbian members of the Roman Catholic Church (CA5a).¹ Dignity and 22 of its members commenced this action pursuant to 42 U.S.C. §1983 for declaratory and injunctive relief on April 29, 1985. The dispute between the parties arose from the desire of respondents to demonstrate on the sidewalk in front of St. Patrick's Cathedral during the now annual "Gay Pride March". That parade is held each year in New York City on the last Sunday of June, and, since 1976, the marchers have proceeded down

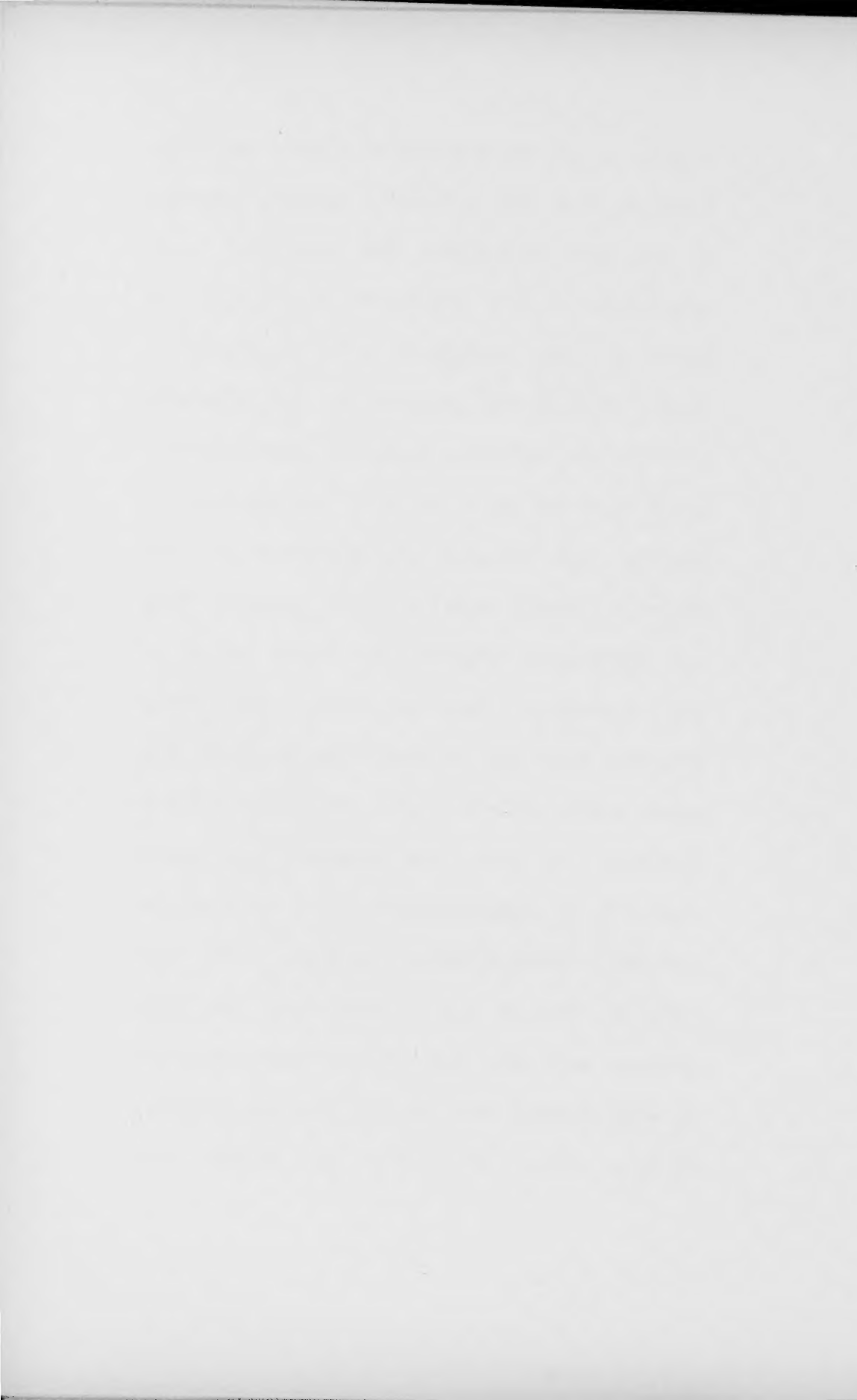
¹References preceded by "CA" are to the Joint Appendix in the Court of Appeals. References preceded by "A" are to the Appendix to this Petition.



Fifth Avenue (CA7a). St. Patrick's Cathedral, the seat of the Roman Catholic Archdiocese of New York, is located on the east side of Fifth Avenue between 50th and 51st Streets, along the parade route (CA7a-8a).

Prior to 1983, Dignity and the general public were given access to the sidewalk in front of the Cathedral during the Gay Pride March (CA10a-12a). In 1981, two self-appointed "protectors" of the Cathedral were arrested and charged with disorderly conduct after attempting to interfere with parade marchers' demonstrations on the Cathedral steps (CA11a-12a, A59-61). In 1982, the Cathedral sidewalk remained open but a greater number of police were assigned to patrol the Cathedral area (CA12a, CA349). In 1983, the Police Department's commanding officer for Manhattan Borough South determined that the sidewalk should be

closed to all demonstrators (A42, A51-52). Prior to that determination, groups opposed to the gay community had indicated their opposition to the presence of Dignity in front of the Cathedral and expressed a desire also to be present on the sidewalk (CA12a-16a; A53-54). Separate demonstration areas were set aside for both the members of Dignity and counter-demonstrators on the opposite (west) side of Fifth Avenue from the Cathedral; Dignity one block north of the Cathedral between 51st and 52nd Streets, with the counter-demonstrators one block south between 49th and 50th Streets (CA15a). In 1984, the sidewalk was again closed to all demonstrators, with an area for pro-gay demonstrators located near the building line on 51st Street west of Fifth Avenue and one for counter-demonstrators on 50th Street west of 5th Avenue (CA16a, CA152; A72). In 1984, the police also

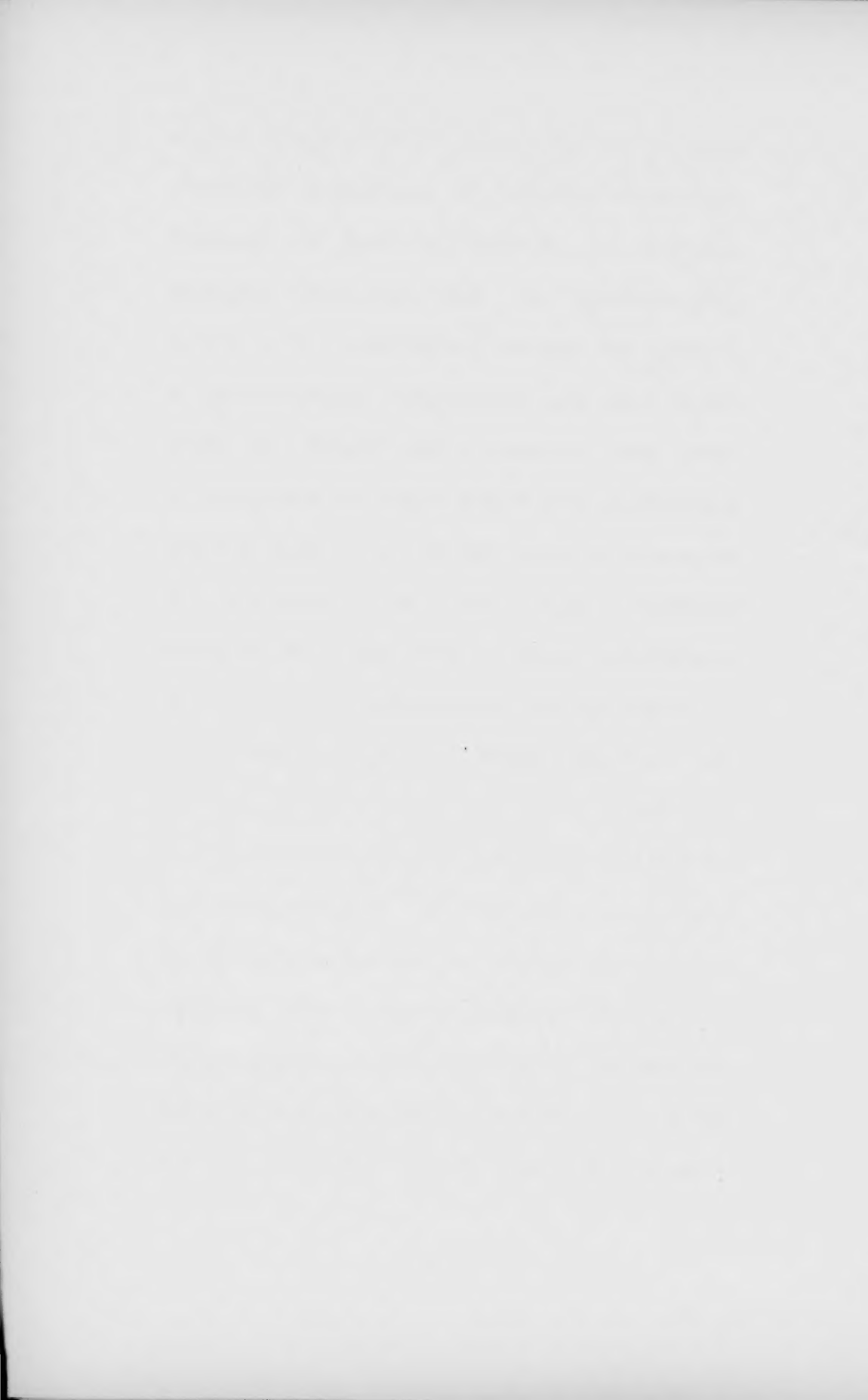


permitted Dignity to stop the line of march for ten to fifteen minutes for a service in front of the Cathedral; two members were allowed to enter the Cathedral sidewalk and place a wreath there (A74). In both 1983 and 1984, approximately 100 counter-demonstrators were present (A67, A72). In both years Dignity refused to take advantage of its assigned demonstration area, although in 1984 the wreath-laying service took place (CA15a-17a, A74). There were no reported incidents of violence at the 1983 or 1984 parades (CA15a, CA17a).

(2)

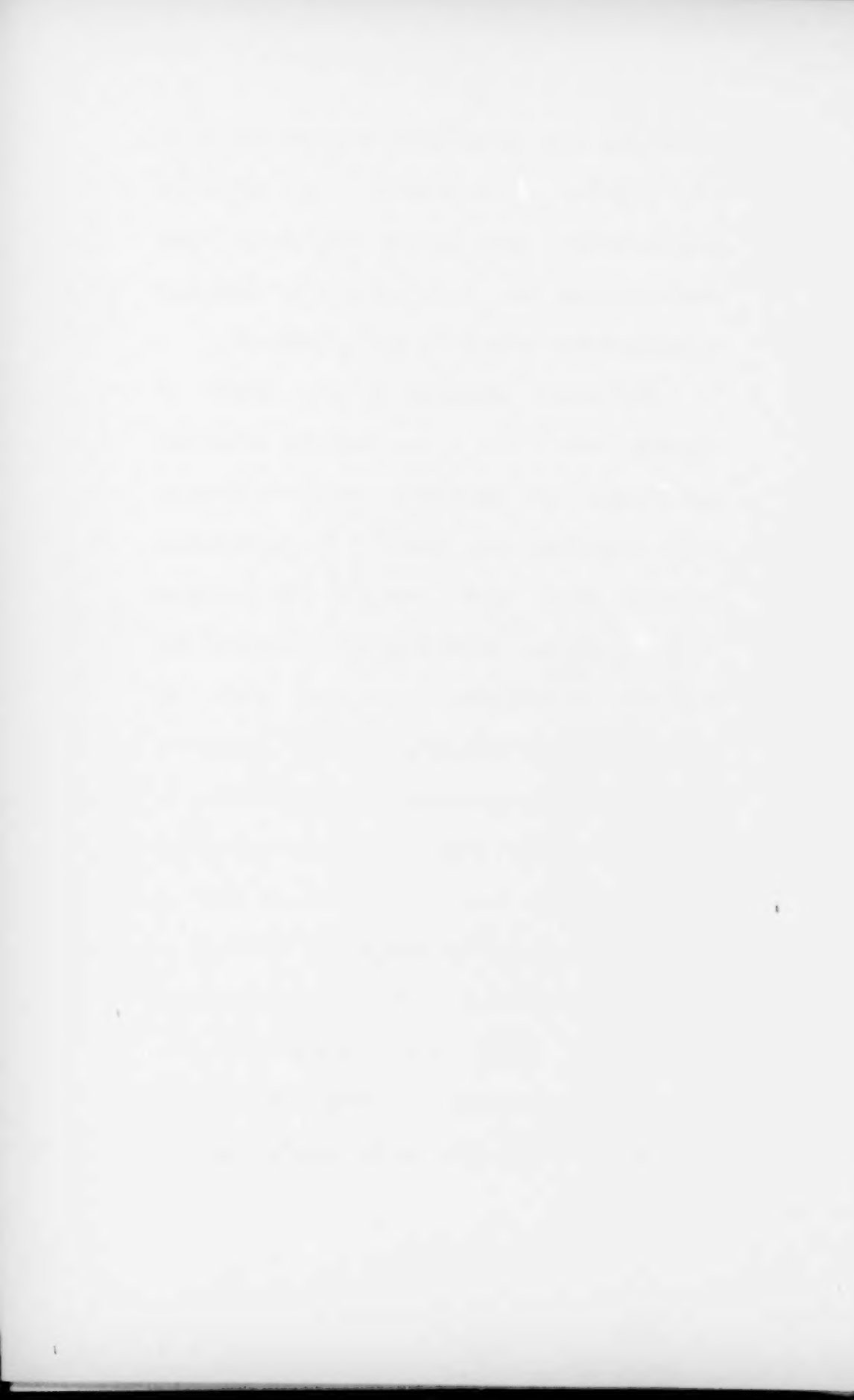
Respondents commenced this action a few months prior to the June 1985 parade, and applied for a preliminary injunction enjoining petitioners from prohibiting them from demonstrating on the Cathedral sidewalk during that year's parade (A203). After a hearing, the District Court (Motley, C. J.)

granted the injunction, and ordered that a reasonable number of respondent Dignity's members be allowed to hold a peaceful demonstration on the Cathedral sidewalk during the march (A199-201). The Court found that the petitioners' determination to close the sidewalk was based on mere speculation that there might be disruption if respondents were allowed to remain on the sidewalk, and that any objective of maintaining public order could be satisfied by removing the counter-demonstrators from the sidewalk (A219-20, A233). The Court also found that the wreath-laying service allowed respondents did not provide an alternative channel of communication as respondents sought to convey a message to the entire passing parade, and although defendants offered to allow demonstration areas to be placed on the east side of Fifth Avenue on the street adjacent to the



Cathedral, the Court held that placement of the Dignity demonstrators in such a demonstration area would interfere, with their message that they should be accepted as mainstream Catholics (A210, A239-40).

Petitioners appealed to the Court of Appeals, which by a 2-1 majority reversed and vacated the injunction (A163, A180-81). After reciting the history of antagonism between gays and members of various religious groups, including the refusal of the Catholic Archdiocese to hire gays in connection with its social service agencies, and provocative statements by both sides in connection with both past and upcoming parades, the Court found the District Court's finding of no danger of violence to be clearly erroneous (A169, A171-73, A178). The Court found the "freeze" of the sidewalk, applicable to respondents and counter-demonstrators, to be content-neutral



and reasonable, narrowly tailored so as to keep the demonstrators a reasonable distance from each other, and that the wreath-laying service and nearby demonstration area afforded ample alternative channels of communication (A177-80). The Court of Appeals noted that the determination that "freezing" the sidewalk was the best means of avoiding violence was one "uniquely within the Police Department's expertise", and that the respondents were being denied only "their preferred forum for demonstration" (A179-80).

(3)

In January 1986, respondents filed an amended complaint containing allegations relating to the 1986 march at which the petitioners intended again to "freeze" the Cathedral sidewalk (CA20a, CA1035-48). A trial on the merits was held by the District Court (Motley, C. J.). In its opinion, the



Court recognized that for the most part the objective facts were not in dispute, but that factual inferences to be drawn from the undisputed facts - such as motive and reasonableness - were in dispute (A38-39). The Court held that the petitioner's practice of keeping respondents off the Cathedral sidewalk was not adequately shown to be part of a "standard police practice" and that the trial record had now made clear that the petitioners' major rationale for keeping respondents off the sidewalk, that their presence there would increase the risk of violence during the Parade, was not credible or reasonable (A85-100; A135-36). Rather, the Court held that "a more convincing explanation for the police decision... is discomfort with the content of Dignity's message." (A136). In its conclusions of law, the Court held that the petitioners' plan was not content-neutral but rather a "heckler's



veto", that the assertion by petitioners of a danger of potential violence was pretextual, and that the police had shown an "excessive sensitivity to the Catholic Church." (A143-44, A150-51). As there was no credible danger of violence, the petitioners' plan was not narrowly tailored to promote a substantial public interest (A152-59). The District Court thus entered a declaration that the plan to keep respondents off the Cathedral sidewalk during the 1986 parade violated the respondents' rights of free speech, and enjoined petitioners from preventing up to one hundred of Dignity's members from holding a peaceful demonstration on the Cathedral sidewalk during the 1986 or any subsequent Gay Pride Parade (A32-34).

Petitioners again appealed to the Court of Appeals. On the day after argument, that Court issued an order on its own motion



staying the injunction of the District Court so as to allow 25 members of respondent Dignity to remain in a limited area of the Cathedral sidewalk, within police barricades, for a thirty minute period; after an interval of no less than 30 minutes, up to 25 counter-demonstrators would be allowed to remain within the same area for an equal period of time (A27-31). At the time of the order, only two days remained to the date of the Parade, and the Court did not believe it could "adequately resolve the significant issues raised by the appeal" in time to issue an opinion prior to the parade (A28). A joint stipulation of facts was thereafter filed with the Court of Appeals, showing that a peak of 150 counter-demonstrators appeared at the Cathedral, and that while Parade participants directed derogatory obscenities at Catholic nuns, priests and Cardinal O'Connor, there

were no reported incidents of violence (A11-12, n.1).

On September 16, 1986, the Court of Appeals issued its opinion (A1). The Court held that Dignity's presence on the Cathedral sidewalk is assured as an exercise of its members' constitutional rights (A17-19). It disagreed with the petitioners' argument that the District Court's findings on the potential for violence are beyond judicial competence, and agreed with the District Court that the restrictions imposed were not "drawn solely to further the government's conceded interest in public safety" (A14-17). However, the Court held that the District Court's opinion and order did not protect the constitutional rights of the counter-demonstrators to convey their opposition to the views of Dignity (A17-19). The Court attempted to accommodate the free speech rights of the two groups of



demonstrators and the legitimate public safety concerns over the potential for confrontation and violence which the Court of Appeals held to be "obviously present when the opposing groups share the same public forum at the same time." (A18). The Court concluded that its own stay order provided a proper, content-neutral accommodation of such concerns (A22-25). The Court affirmed the declaration of unconstitutionality, but replaced the District Court's injunction with the provisions of its stay order, to be subsequently modified by the District Court on a showing of significantly changed circumstances or by agreement (A25-26).

REASONS FOR GRANTING THE WRIT

The judgment of the District Court, as modified by the order of the Court of Appeals, constitutes an impermissible second guessing of the judgment of those charged

by state law with assuring public safety which is not only unsupported by precedent but is inconsistent with the holding of this Court in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) and that of the Court of Appeals for the District of Columbia Circuit in White House Vigil v. Clock, 746 F.2d 1518 (D.C. Cir. 1984). The police judgment that the competing desires of respondents and counter-demonstrators for use of the Cathedral sidewalk required that the sidewalk be "frozen" to all demonstrations other than the wreath-laying service by respondents was a proper and rational exercise of their statutory duties. In addition to the wreath-laying service, petitioners have always made nearby demonstration areas available to respondents; this case concerns only the side of Fifth Avenue on which respondents' demonstration should take place. Although petitioners



have always attempted to cooperate with respondents and the organizers of the Parade, respondents have continued to press for the optimal setting for their demonstration. The limitations on respondents' speech is de minimus, and we are aware of no case law to support the District Court's finding that it is a "heckler's veto." The order of the Court of Appeals, premised on a recognition that the presence of respondents and counter-demonstrators on the Cathedral sidewalk poses an obvious potential for confrontation and violence, but which requires that a limited number of respondents and counter-demonstrators be allowed to demonstrate on the sidewalk under specific controlled conditions, constitutes a matter of disagreement with petitioners' judgment as to the best means of dealing with a problem of public safety, and is

therefore the kind of fine-tuning forbidden by this Court in Clark. The federal judiciary should not interfere with reasonable time, place and manner restrictions grounded in good-faith police judgments, especially those judgments made by the police of our large municipalities whose streets provide a forum for groups with diverse and often hostile philosophies.

(1)

This Court has recently cautioned that courts must be careful not to substitute their judgment for that of the responsible governmental entity when reviewing time, place and manner restrictions:

The Court of Appeals' suggestions that the Park Service minimize the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage, whether by sleeping or otherwise, and these suggestions represent no more than a disagreement with the Park Service over how much



protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either United States v. O'Brien or the time, place and manner decisions assign to the judiciary an authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level or conservation is to be attained. (emphasis added.)

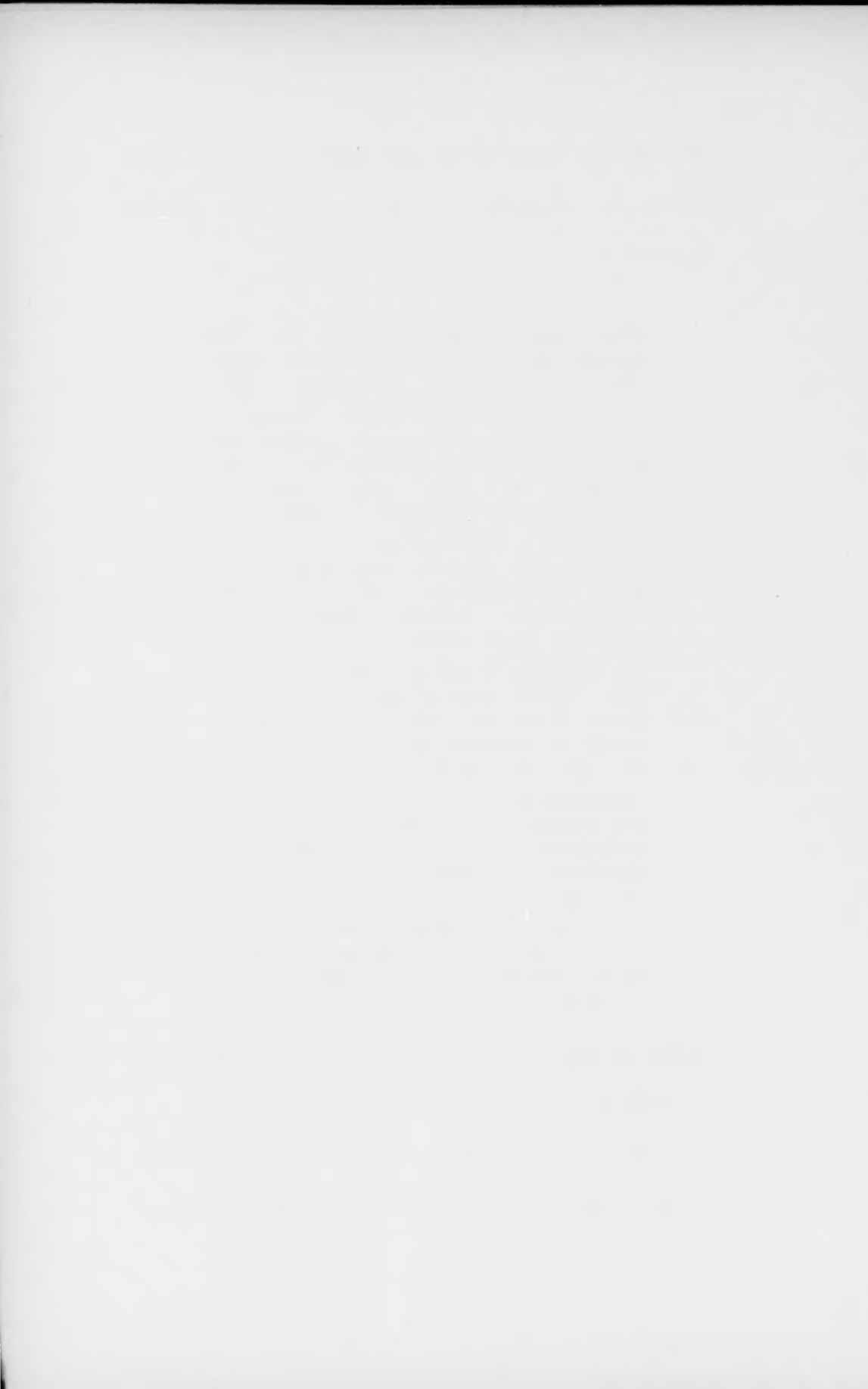
Clark v. Community for Creative Non-Violence, supra, 468 U.S. at 299; see also, United States v. Albertini, ___ U.S. ___, 105 S. Ct. 2897, 2907 (1985) ("The validity of such regulations does not turn on the judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests."). Likewise the Court of Appeals for the District of Columbia Circuit, in a decision which, it is submitted, is consistent with the dictates of Clark, held that in reviewing a National Park Service

regulation restricting demonstrations on the sidewalk directly in front of the White House:

The issue for decision on this appeal is not factual, it is legal; did the Park Service draft regulations that were "narrowly tailored to serve a significant governmental interest"? The agency in this case was the institution charged with the principal resolution of factual issues; the court's role was limited to determining whether the regulations which the agency adopted were within the boundaries of constitutionality prescribed by the first amendment. If they were, it is not the province of the court to "finetune" the regulations so as to institute the single regulatory option the court personally considers most desirable. Courts possess no particular expertise in the drafting of regulatory measures; their role is to uphold regulations which are constitutional and to strike down those which are not. (Emphasis in original.)

White House Vigil v. Clark, supra, 746 F.2d at 1528-29.

The Court of Appeals in this case refused to follow the holding in White House



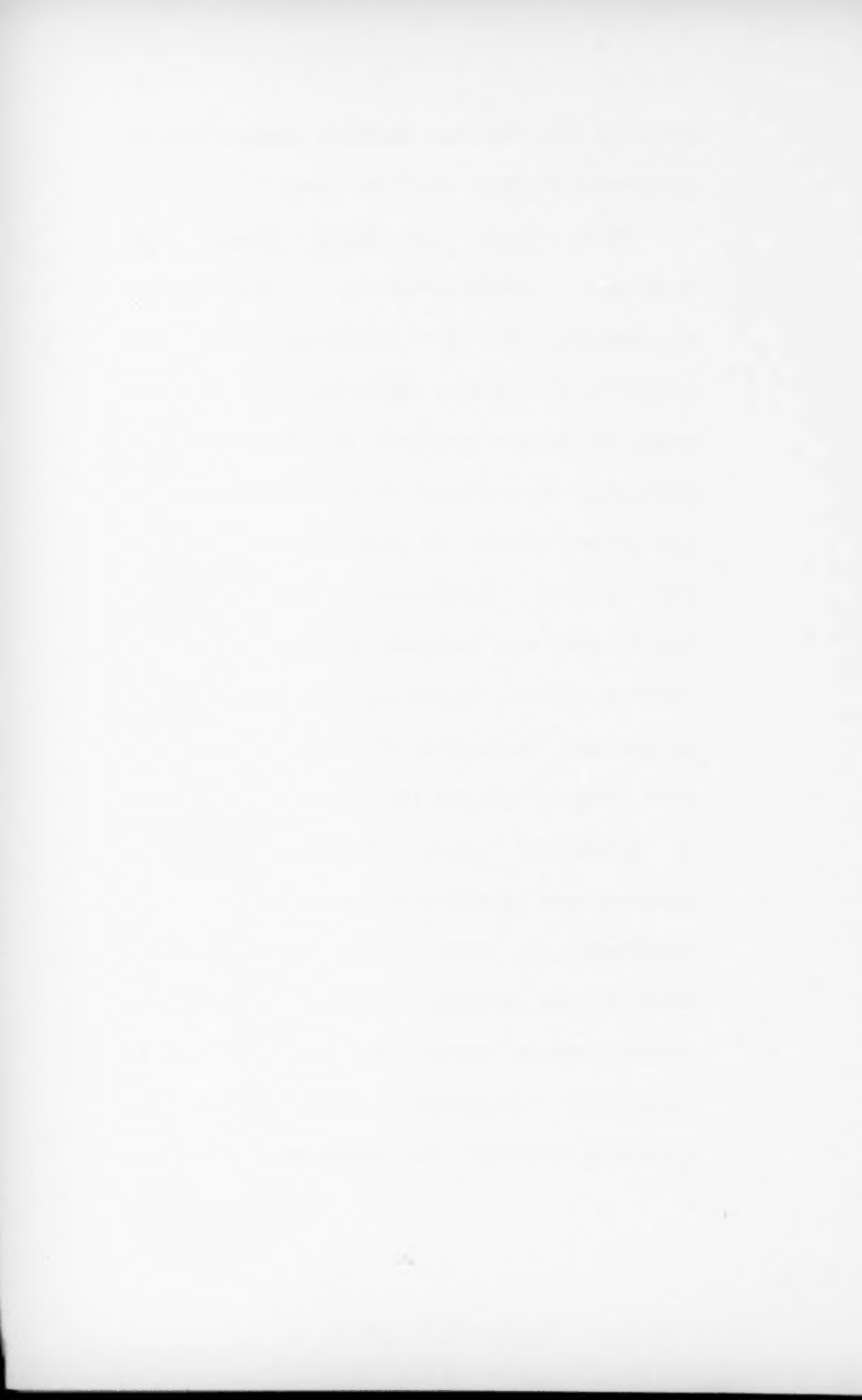
Vigil (A15). A consideration of the opinion of the District Court, whose declaration of unconstitutionality was affirmed by the Court of Appeals, reveals the extent to which those courts have second guessed the judgment of the petitioner police department in whom state law has reserved the responsibility for assuring the public safety. New York City Charter, §435(a). In finding the petitioner's concern for violence to be speculative and irrational, the District Court pointed to, inter alia: 1) the failure of prior fears concerning violence and size of crowds to come to fruition (A96-97, A105-07); (2) the religious conviction of some anti-gay counter-demonstrators (e.g., Protestant or Jewish), whom the Court believed would have little interest in the presence of Dignity on the Cathedral sidewalk (A103-104, A112-13); and (3) the Court's belief that anti-gay hostility arising

from controversies concerning gay rights would be directed at the parade itself rather than the presence of respondents on the sidewalk (A114-16). The Court found that acts which inflamed anti-gay feeling during parades in the past, including the placing of a crucifix in a trash can and the dressing of a marcher as a nun with a pig's face, were not related to respondents (A116-17). The Court also analyzed other recent demonstrations involving religious or gay issues, and found they were not logically connected to any potential for violence on the Cathedral sidewalk (A117-25). The District Court held that even if there were a large turnout by counter-demonstrators, "it is extremely unlikely that the police will be unable to maintain order" (A125). Although the Court of Appeals, like petitioners, recognized the danger of violence and modified the injunction, it nevertheless



affirmed the District Court's declaration of unconstitutionality (A18-19, A26).

While Clark and White House Vigil involved administratively promulgated regulations, it is submitted that the judgment of a police department as to those steps it deems prudent or necessary for prevention of violence at a demonstration on the public streets is deserving of equal if not greater deference. The kind of fact-finding and analysis engaged in by the District Court, involving the weighing of danger and the ability of police to deal with such danger, placed the Court in the shoes of petitioner police department, whose members are specifically entrusted with and competent to make such determinations. Even in the absence of proof that serious violence would result from the presence of respondent Dignity's members on the Cathedral sidewalk, the petitioners' expertise



in determining the method of most safely dealing with a parade or demonstration marked by antagonistic forces should not be second guessed by either the District Court or the Court of Appeals. Here the petitioners' plan to allow the wreath laying service and nearby demonstration areas results in only a de minimus limitation on respondents' speech, one, it is submitted, which is no less intrusive than the Court of Appeals' order. Just as this Court may not replace the Park Service as manager of the nation's parks, the Courts below should not be allowed to replace their judgment for that of petitioners. Clark, supra, 468 U.S. at 299.

(2)

Applying the dictates of this Court in Clark, it becomes apparent that the decision of the petitioners is a reasonable time, place and manner restriction. It is content-



neutral; there has been no attempt to silence respondents' message, and the "freeze" applies equally to both respondents and counter-demonstrators. The case law relied upon by the District Court for its holding that the restriction was not content-neutral but rather was a "heckler's veto" simply does not support such holding. See, Coates v. City of Cincinnati, 402 U.S. 611 (1979); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Collin v. Chicago Park District, 460 F.2d 746 (7th Cir., 1972). In contrast to those cases, the respondents have not been threatened with criminal prosecution for assembling or speaking, nor have they been barred from delivering their message to their intended audiences. There has been no attempt to "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." See

Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972), the sole case cited by the Court of Appeals in finding that respondents and counter-demonstrators must be allowed access to the Cathedral sidewalk (A19). This case concerns only the side of the street on which the respondents' demonstration should take place, and the law is clear that the First Amendment does not guarantee an optimal setting for speech as demanded by respondents; there is simply "no right to the backdrop most interesting to press photographers or television cameramen". Finzer v. Barry, 798 F.2d 1450, 1462-63 (D.C. Cir., 1986), citing Heffron v. Int'l. Soc. for Krishna Consc., 452 U.S. 640, 647 (1981). Furthermore, while the content of respondents' and the counter-demonstrators' speech is not unrelated to the need to keep the Cathedral sidewalk closed, it is the "secondary effect"



of their presence on the sidewalk, i.e, the threat of violence, not the content of such speech, which petitioners seek to prevent.

City of Renton v. Playtime Theatres, Inc.,

___U.S.___, 106 S. Ct. 925, 929 (1986).

The vague finding by the District Court to the effect that the petitioners were motivated by "sensitivity to the discomfort of counter-demonstrators and the Catholic Church ... with Dignity's message...", a finding grounded in the District Court's improper disagreement with petitioners' judgment that the Cathedral sidewalk should be closed to all demonstrators during the March (A136), is, in any event, insufficient to constitute a finding that the substantial motivating factor in the decision by petitioners' responsible officials to close the sidewalk was the content of respondents'



speech, not prevention of possible violence.²
City of Renton v. Playtime Theatres, Inc.,
supra, 106 U.S. at 929; In re G & A Books,
Inc. v. Stern, 770 F.2d 288, 297 (2d Cir.,
1985), cert. den. sub. nom. M.J.M.
Exhibition Inc. v. Stern, ___ U.S. ___, 106 S.
Ct. 1195 (1986).

The issue of whether the restriction is narrowly tailored provides what is perhaps the most stark example of "fine-tuning" in this case. The Court of Appeals' determination that, rather than having all demonstrators kept off the sidewalk and placed in areas nearby, there should be limited numbers of each group of demonstrators allowed on the sidewalk within

²The Court of Appeals similarly opined that "[w]e agree with the district court that the restrictions imposed were not shown solely to further the government's conceded interest in public safety" (A17).



limited, protected areas, is the kind of judicial disagreement with responsible officials which is simply outside the authority of the judiciary. Clark v. Community for Creative Non-Violence, supra, 468 U.S. at 299. The Court's belief that there may be a less restrictive way to further the significant government interest is not a basis for invalidating the restriction. United States v. Albertini, supra, 105 S. Ct. at 2907.

Finally, while the District Court did not reach the issue of whether there remained ample alternative channels for communication of respondents' message, the Court of Appeals, on appeal from the preliminary injunction, explicitly held that the wreath-laying service, together with nearby available demonstration areas, provided ample alternative channels for respondents' message (A179). This is consistent with the law in the Second Circuit (see, Concerned Jewish



Youth v. McGuire, 621 F2d 471, 475-76 (2nd Cir. 1980), cert. den. 450 U.S. 913 (1981), and, it is submitted, the decisional law of this Court. See Heffron v. Int'l Soc. for Krishna Consc., supra, 452 U.S. at 654-5.

In conclusion, we recognize that the decision of petitioners' responsible officials to close the Cathedral sidewalk was a result of caution, perhaps an excess of caution. However, such caution, not always shared by the judiciary, reflects a proper concern for their responsibility to preserve the public order. The decision of the Court of Appeals, if allowed to stand, will serve a mischief by allowing courts to interfere with and second guess the decisions of those charged by law with the responsibility of assuring the public safety of all, including demonstrators like respondents. Accordingly, this petition should be granted.



CONCLUSION

THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE
GRANTED.

Respectfully submitted,

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Attorney for Petitioners.

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December 12, 1986